U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 07 2007

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

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INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an assistant researcher at the University of Wisconsin-Madison Medical School. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

We note that, although the petitioner's attorney took part in the initial submission and a subsequent response to a request for evidence, there is no evidence that counsel participated in the preparation or filing of the appeal. On appeal, the petitioner indicates that a brief will be forthcoming within 30 days. The petitioner did not indicate that this brief would be prepared by counsel, and counsel did not indicate that an attorney-prepare brief was in preparation. To date, 15 months after the filing of the appeal, the record contains no further substantive submission from the petitioner. We therefore consider the record to be complete as it now stands.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion

of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Counsel states that the petitioner's current projects concern "(1) cellular mechanisms of cancer . . . and development of new therapeutic agents for the treatment of cancer; (2) mechanism of mastocytosis (uticaria pigmentosa) and development of new therapeutic agents for treatment of mastocytosis." The intrinsic merit of such research is not in dispute, and the beneficiary's work has national scope as the research findings are disseminated nationally and their applicability is not geographically limited. The key issue is the extent to which the petitioner's work sets him apart from other researchers in his specialty.

Counsel lists several of the petitioner's achievements, calling the petitioner "**the first investigator in the world**" to make various findings (counsel's emphasis). This means that the petitioner's achievements are original, nothing more. For every new fact or detail, whether major or minor, significant or trivial, there is someone who is the "first . . . in the world" to observe it. While it is to the petitioner's credit that he performs original work, rather than merely duplicating the past work of others (which is the only way he could fail to be "the first investigator in the world" to make his findings), originality is not presumptive evidence of eligibility for the national interest waiver. Counsel relies on similar arguments to make fairly routine events (such as participating in peer review or relying on outside funding) appear to be distinguishing achievements. These arguments are not persuasive.

As an example of the exaggeration that affects counsel's evaluation of the evidence, we note the petitioner's membership in four professional associations. Counsel states that the petitioner has earned these memberships through his "great accomplishments." The petitioner has submitted background evidence from the associations that does not support this assessment. The American Association for Cancer Research (AACR) is comprised of "over 20,000 scientists from around the world," and "Active Membership in AACR is open to investigators worldwide . . . who have conducted two years of research resulting in peer-reviewed publications." The membership requirements of the Chinese Society of Genetics, as stated in an unattributed document in the record, match those of the AACR almost word-for-word. Publication and two years of experience are not "great accomplishments."

Materials from the Society for Investigative Dermatology indicate even more lenient membership standards, stating: "Active membership is open to any scientist whose work has relation to investigative dermatology or cutaneous biology." The petitioner has not submitted any evidence of the membership requirements for the Chinese Medical Association, but at 430,000 members, the sheer size of the organization precludes any reasonable inference of stringent or exclusive requirements.

With regard to the reasons why the petitioner should receive a national interest waiver, rather than rely on the labor certification process, counsel offers several general claims and complaints about the labor certification process. Counsel contends, for instance, that there is "a tremendous backlog in processing labor certification application[s]" resulting in a delay of "five to six years." Whatever problems may exist in the labor certification process, either in conception or execution, counsel has not shown that Congress intended the national interest waiver to be simply a back door or overflow release valve to bypass that process. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Matter of New York State Dept. of Transportation* at 223. Indeed, if a backlog at the Department of Labor were *prima facie* grounds for granting more waivers, such a policy would simply encourage the filing of frivolous or redundant applications for labor certification, thereby creating or exacerbating just such a backlog.

Witness letters discuss the petitioner's work at various stages in his career. The majority of the witnesses have demonstrable connections with the petitioner. [redacted] of Inner Mongolia Medical College describes the petitioner's earliest work:

> I know [the petitioner] and his achievements very well because I am the medical director of the hospital where [the petitioner] had most of his working experience. . . . [The petitioner] made remarkable achievements while he was working in China. . . . As the princip[al] investigator of the project "Screening of endemic arsenism related genes with differential display PCR method," he successfully accomplished the project by screening the arsenism related differentially expressed genes and by studying their role in cancer development.

[redacted] describes other projects that the petitioner has undertaken, up to his most recent work at the University of Wisconsin. [redacted] of Inner Mongolia University similarly describes the petitioner's various projects over the years and praises the petitioner's "extraordinary scientific research expertise."

[redacted], now Regional Director of the South West Pacific Regional Office of the International Union for Health Promotion and Education, previously held various positions of authority at the World Health Organization (WHO). [redacted] based her evaluation on "review of documents concerning [the petitioner's] scientific background and achievements." [redacted] discusses the beneficiary's work in China and, later, at the University of Wisconsin, and states that the high caliber of the petitioner's earlier work earned him a six-month WHO fellowship to Emory University[redacted]n does not, however, offer any information about the work the petitioner performed under the WHO fellowship. [redacted] states that the petitioner's "excellent work led to the discovery of [a] new mechanism of cancer's resistance to chemotherapy," and that the petitioner "also identified some inhibitors of angiogenesis, which – if [they] can be conducted in consecutive steps – may lead to [a] breakthrough in cancer treatment."

In 2001, the petitioner served as a visiting professor at the David Geffen School of Medicine at the University of California, Los Angeles (UCLA). Two UCLA faculty members have provided witness letters, but neither of them discussed the petitioner's work there in any detail. Assistant Dean [redacted] offers general praise for the petitioner's skills and work ethic, and states that the petitioner's "current research at the University of Wisconsin Madison is extremely valuable." [redacted], Director of Respiratory Medicine at Olive View-UCLA Medical Center, states: "At UCLA, [the petitioner] and I have worked together in a number of research projects. He demonstrated his skill and experience as a superb physician, and his knowledge in biology, molecular-biology and biochemistry is outstanding." By way of specific details, [redacted]u has more to say about the petitioner's past work in China, stating, for instance: "He is the first scientist who finds the arsenism related gene fragment and he is the initial research scientist who discovered the 'Fas-mediated programmed cell death' in pediatric leukemia."

[redacted] of the University of Wisconsin-Madison Medical School discusses the petitioner's current work:

> [The petitioner] is now a key researcher in my National Institutes of Health (NIH) sponsored research projects investigating the mechanisms of c-kit kinase related oncogenesis and the pathogenesis of mastocytosis and other human and canine cancers. The position filled by [the petitioner] requires proven extraordinary ability in the field of molecular biology and medicine. . . .

> [U]nderstanding the key components in c-kit related signal transduction pathways at cellular level is crucial to revealing disease mechanisms and to find new targets for new therapeutic approaches to many diseases. . . .
>
> [The petitioner's] research projects are also focused on skin cancer related protein interactions and signal transduction pathways. We have recently determined the function of several hallmark proteins found in cancer cells, and have shown that they play a key role in cancer development. We have identified a key protein that allows cancer cells to survive, and [the petitioner] is screening for novel proteins that interact with this protein. . . . These studies will result in the development of new treatments for cancer, especially melanoma. We have promising and exciting results, and I am confident of more significant findings in the future, provided that we can retain the valuable services of [the petitioner].

[redacted] an Assistant Professor at the University of Pittsburgh who has "served as an advisor for many research fellows and scientists at [the] University of Wisconsin," discusses the petitioner's work at the University of Wisconsin and at other facilities. [redacted] asserts that the petitioner's work is "internationally recognized" and that the petitioner "is undeniably one of the best scientists in the field of biomedical research."

[redacted] had formerly studied under [redacted], an Associate Professor at the University of Michigan. [redacted] states that the petitioner "is currently playing a critical role at the University of Wisconsin Madison Medical School in NIH funded projects investigating the function of a putative tumor activating protein family. [The petitioner] is extremely suitable for this job because [of] his extensive training and research experience in molecular biology and medicine."

An additional letter, from [redacted] of Wisconsin, offers general praise for the petitioner's "proficiency and excellence in the medical field." [redacted] states: "Cancer has proven to be one of the most deadly diseases in the world today," but offers no specific information about the petitioner's research.

Counsel states that the petitioner's "research activities have yielded a great number of publications with far-reaching impact on the medical and biological research. He has authored and co-authored more than 20 original articles, which are highly regarded by the peer-reviewers in the field of his expertise, and highly relied on by his fellow researchers." Counsel does not identify any evidence to show that the petitioner's articles have had "far-reaching impact" or are "highly regarded" or "highly relied on." Without such evidence, we have no reason to believe that counsel's assessments are particularly accurate. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 2, 4 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel cites the impact factors of some of the journals that have carried the petitioner's articles. The impact factor does not establish the importance of any specific article from a given journal. Rather, the impact factor of a journal is calculated from the citation rates of individual articles, averaged together. Counsel has effectively acknowledged the importance of citation as a means of gauging the impact of a scholarly article,

but counsel does not take the obvious next step, which is to demonstrate the citation record of the petitioner's own articles in particular, rather than the journals in general. The petitioner's initial submission, however, is entirely devoid of evidence to show that independent researchers have heavily cited the petitioner's articles.

On June 24, 2005, the director issued a request for evidence (RFE), instructing the petitioner to submit additional evidence to show that the petitioner meets the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director requested "copies of any published articles by other researchers citing or otherwise recognizing" the petitioner's work, and evidence to "demonstrate to some degree [the petitioner's] influence on the field of employment as a whole."

In response, counsel states: "Denying . . . permanent resident status to [the petitioner] means depriving the prospective employer of the service of a highly skilled, able and accomplished scientist." Counsel, here, fallaciously equates denial of a waiver with denial of permanent resident status, an argument that rests on the unproven assumption that the national interest waiver is the only possible means by which the petitioner can seek such status. Furthermore, counsel makes the equally fallacious assumption that one need only be "highly skilled, able and accomplished" to qualify for a waiver.

The petitioner's response to the RFE includes several new witness letters, new documents, and copies of previously submitted materials. With regard to citation of the petitioner's work, counsel observes that two of the new witness letters refer to citation of the petitioner's work. In new letters, [redacted]g offers the general assertion that the petitioner's work has been "extensively cited," while [redacted] goes into more detail: "According to the citation index in ISI Journal Citation Reports, [the petitioner's] research papers have been cited on twelve occasions by scientists from different countries, such as U.S., Japan, U.K., Germany, China and so on. Frequent citations by independent researchers around the world demonstrate more widespread interest in, and reliance on his work."

The record does not contain a printout from ISI Journal Citation Reports. The only first-hand evidence of citation that the petitioner has submitted consists of copies of four articles. The authors of these articles represent exactly the same countries named in [redacted]'s letter. Three of the four articles were co-authored by [redacted] of the Department of Ophthalmology and Visual Sciences at the University of Wisconsin-Madison. The petitioner worked in that same department for two years, and the two collaborated on an article published in 2003 [redacted] self-cites that 2003 article in all three of the newer articles. This leaves one documented independent citation of the petitioner's work, in an article by researchers in Japan and Scotland; the petitioner's article is cited, along with two others, in the context of a discussion of cell culture preparation. The record offers no evidentiary support for the claim that independent researchers have "extensively cited" the petitioner's work.

The letters submitted in response to the RFE are all from institutions where the petitioner has worked, or from witnesses who had already provided letters with the initial filing. A number of these witnesses damage their own credibility by making claims that the petitioner's own evidence refutes, such as the claim that AACR membership requires "outstanding research achievements." Because a number of the petitioner's witness letters contain assertions that are uncorroborated or outright contradicted by the available evidence, we cannot afford these letters significant weight as credible evidence.

Counsel states:

> [L]abor certification, a sterile procedure . . . works well for a machinist or even tax accountant for instance, where the minimal job qualifications are in fact quantifiable. However, in the instant case, [the petitioner's] example has demonstrated that the very essence of the work is creativity, ingenuity, inventiveness, imagination, and sagacity, not to mention an unquantifiable body of knowledge, experience, expertise, and education. The position in this instant case is simply not amenable to the labor certification process. It is respectfully suggested that the fact that in certain cases the situation is not amenable to the labor certification process is the reason that Congress provided for the National Interest Waiver.

Congress made research scientists, as members of the professions, subject to the job offer requirement, and in its original form (prior to a technical amendment), the statute did not clearly indicate that the national interest waiver was available to members of the professions holding advanced degrees. Therefore, we are not persuaded by the general argument that the technical sophistication of their work should exempt scientists as a class from the job offer/labor certification requirement.

The director denied the petition on November 22, 2005, stating that the petitioner has failed to submit evidence to show that his work has been especially influential in his field. On appeal, the petitioner submits copies of previously submitted exhibits and some new materials.

The petitioner protests that the director did not give sufficient consideration to his 1995 WHO fellowship. WHO documentation submitted on appeal indicates that the fellowship's "stipend rate . . . is modest – the minimum necessary to support one person. The Fellow should be cautioned against bringing his family unless he has substantial supplementary funds of his own to care for them." The petitioner has not persuasively explained why his receipt of a subsistence-rate stipend should be considered a significant achievement that helps to qualify him for a waiver. We note the petitioner's claim that there are apparently a great many applicants seeking a limited number of fellowships, but winning a competitive slot in this manner does not necessarily translate into influence on the field. Furthermore, the fellowship was not a prize for past work. Rather, it was essentially a salary to cover a later period of research.

A new letter comes from [redacted], a Senior Research Scientist at PPD, Inc., a biopharmaceutical research firm located in Middleton, Wisconsin[redacted] states that the petitioner's "original discoveries have received wide notice and have been applied in my work for the theory and technology," and that the petitioner's "papers have been cited many times by his peers." As before, it is possible to provide empirical evidence to support these claims, but the petitioner provides no such evidence. The only indication that the petitioner has widely influenced his field comes in the form of letters that the petitioner has asked others to write on his behalf.

The petitioner has shown himself to be a productive and respected researcher, whose contributions are gratefully appreciated by his employers and collaborators. The available objective evidence, however, does

not support the subjective claims put forth in support of the waiver application. The petitioner has explained what it is that he has done and is doing, but he has not shown how this work is of greater importance or impact than the work being performed by countless other researchers in his specialty. The tautological assertion that he is the first in the world to make certain original findings is of little service in this regard.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.